

UNITED STATES DISTRICT COURT  
DISTRICT OF RHODE ISLAND

ROCCO P. DESIMONE

v.

UNITED STATES OF AMERICA

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CR No. 09-24S

**REPORT AND RECOMMENDATION**

Lincoln D. Almond, United States Magistrate Judge

Pending before the Court is Rocco DeSimone's Motion for Leave to Appeal In Forma Pauperis ("IFP"). (Document No. 143). Because I find that the appeal is groundless and thus not taken in good faith, I recommend that the District Court DENY DeSimone's Motion.

DeSimone's right to appeal *in forma pauperis* is governed by 28 U.S.C. § 1915 which provides that, "[a]n appeal may not be taken in forma pauperis if the trial court certifies in writing that it is not taken in good faith." 28 U.S.C. § 1915(a)(3). "Because the good faith standard is an objective one, an appeal is deemed not taken in good faith if the issues presented are frivolous. An appeal is considered frivolous when it is based on an 'indisputably meritless legal theory or factual allegations that are clearly baseless.'" Lyons v. Wall, No. 04-380, 2007 WL 2067661 at \*1 (D.R.I. July 13, 2007) (internal citations omitted).

In the present case, DeSimone's Motion for Certificate of Appealability was denied by District Judge Smith because DeSimone "failed to make a substantial showing of the denial of a constitutional right as to any claim, as required by 28 U.S.C. § 2253(c)(2)." (Document No. 138). DeSimone has still failed to make such a showing. Accordingly, this Court recommends that the

District Court find that the appeal is not taken in good faith and DENY Plaintiff's Motion to Appeal IFP. (Document No. 143).

Any objection to this Report and Recommendation must be specific and must be filed with the Clerk of the Court within fourteen (14) days of its receipt. See Fed. R. Civ. P. 72(b); LR Cv 72. Failure to file specific objections in a timely manner constitutes waiver of the right to review by the District Court and the right to appeal the District Court's decision. See United States v. Valencia-Copete, 792 F.2d 4, 6 (1<sup>st</sup> Cir. 1986); Park Motor Mart, Inc. v. Ford Motor Co., 616 F.2d 603, 605 (1<sup>st</sup> Cir. 1980).

/s/ Lincoln D. Almond  
LINCOLN D. ALMOND  
United States Magistrate Judge  
November 8, 2013